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No. ____-____

IN THE

Supreme Court of the United States

October Term, 1986

ETHEL A. ROBERTS,
Personal Representative of
the Estate of Arthur N. Roberts, Deceased,
Petitioner,

v.

JAMES SPALDING, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 14, 1986

QUESTIONS PRESENTED

1. Whether a Fourteenth Amendment Due Process Clause claim that a state official, administrator or employee has violated a penitentiary inmate's Eighth Amendment right of access to adequate medical care may be established by proof of intentional participation by such official, administrator or employee in acts or omissions in the institution's denial of access to such care?

2. Whether a 35 year old penitentiary inmate, dying of coronary artery disease, had a state-based liberty interest, within the meaning of and protected by the Due Process Clause of the Fourteenth Amendment, that his two requests (11 days and one day before death) for supplemental medical care be processed as authorized and provided for by Washington Administrative Code Section 275-91-070, and that he receive such care?

LIST OF PARTIES

The parties to this proceeding are the same as those in the proceedings below. The petitioner Ethel A. Roberts appears in this proceeding as well as in the prior proceedings in her capacity as the Personal Representative of the Estate of Arthur N. Roberts, deceased.

The four respondents in both this proceeding and the proceedings below are and were James Spalding, in 1979 but no longer the Superintendent of the Washington State Penitentiary; W. Edward Naugler, in 1979 but no longer the Washington State Department of Institutions Medical Director; Barbara Anderson, in 1979 but no longer the Health Care Manager, Washington State Penitentiary; and Joyce Lingerfelt, in 1979 a Nurse Practitioner at the Washington State Penitentiary.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Constitutional Provisions, Regulations Involved 2

Statement of the Case 4

Reasons For Granting The Writ 11

I. *Estelle v. Gamble* needs clarification as to 42 U.S.C. §1983 claim responsibility for state officials/administrators/employees who intentionally participate in institution's denial of access to adequate medical care. 11

II. The Ninth Circuit decision denying a Fourteenth Amendment Due Process Clause-protected, state-based liberty interest for supplemental medical care raises an important and unresolved issue. 15

Conclusion 18

Appendices:

Appendix A A-1

Appendix B B-1

Appendic C C-1

TABLE OF AUTHORITIES

Table of Cases

	Page
Bauman v. Arizona Department of Corrections, 754 F.2d 841 (9th Cir. 1985)	17
Daniels v. Williams, 474 U.S. ____, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986)	14,19
Estelle v. Gamble, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976)	11,12,13,14,15,16,19
Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979)	17
Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985 *en banc*)	13,18
Hewitt v. Helms, 459 U.S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983)	13
Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982)	11,12,13
In re Kemmler	15
Parratt v. Taylor, 451 U.S. 527, 68 L. Ed. 2d 420, 101A S. Ct. 1908 (1981)	14
Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985 *en banc*), cert. denied, ____ U.S. ____, 88 L. E. 2d 767, 106 S. Ct. 788 (1986)	17

United States Statutes

28 U.S.C. § 1254 2

42 U.S.C. § 1983 2,9,12,13

Page

Washington State Regulations

Washington Administrative Code 275-91-011 . . . . . 3,7,8,9, 10,13,14,17,18

Washington Administrative Code 275-91-050 . . . . . 4,9,10, 14,18

Washington Administrative Code 275-91-070 . . . . . 4,8,9, 10,13,14,15,16,18

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Ethel A. Roberts respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on February 24, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 783 F.2d 867, and is reprinted in the Appendix hereto, p. A-1, *infra*.

The Order of the Ninth Circuit denying petitioner's Petition for Rehearing has not been reported. It is reprinted in the Appendix hereto, p. B-1, *infra*.

The decision of the United States District Court for the Western District of Washington (Jack E. Tanner, J.) has not been reported. The Court's Judgment on Jury Verdict is reprinted in the Appendix hereto, p. C-2, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner brought this suit in the United States District Court for the Western District of Washington at Tacoma. Trial to a jury resulted in a verdict and judgment for the respondents entered January 20, 1984. A pre-trial motion for summary judgment, not determined upon before trial, and post-trial motions based upon due process claims were denied on March 8, 1984.

On petitioners appeal (No. 84-3752), the Ninth Circuit on February 24, 1986 entered its judgment and opinion affirming the judgment and order of the District Court. The petitioner's subsequent petition for rehearing and her suggestion for an *en banc* rehearing were, respectively, denied and rejected by the Ninth Circuit on April 15, 1986.

The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, REGULATIONS INVOLVED

United States Constitution:

Amendment VIII

Bails, Fines, Punishments. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

§ 1 Citizenship Rights Not To Be Abridged By States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2 -4 [Not Applicable]

State of Washington Adminstrative Code:

WAC 275-91-011 Medical/dental care — General policy. The policy of the department of social and health services with regard to medical and dental care for inmates of adult correctional institutions is to provide, at a minimum, a degree of care which is designed to reasonably respond to an inmate's serious medical and dental needs. The considerations of proper medical/dental procedure, time and available resources are material in defining what is a reasonable response in any particular situation. More than the minimum level of care may be provided when such additional care comports with proper medical practice and is reasonably affordable from the department's resources. Serious medical needs are those which, if not responded to, will

(1) Cause or allow to continue significant or debilitating pain; or

(2) Cause significant deterioration of the inmate's medical condition during the period of his incarceration [Order 1252, § 275-91-001, filed 11/21/77.]

WAC 275-91-050 Use of allied health professionals. Allied health professionals may be used in the medical and dental health programs at each institution. When operating under the supervision of a licensed physician or dentist, an allied health professional may conduct initial screening, treat minor illnesses, and do related tasks. [Order 1252, § 275-91-050, filed 11/21/77.]

WAC 275-91-070 Supplemental care. Any inmate may, at his or her own expense, obtain medical or dental care additional to that mandated by the provisions of this chapter: *Provided,* That a doctor or dentist in the department's employ certifies that the proposal for supplemental treatment comports with sound medical or dental practice. The time and place of the performance of the supplemental care are subject to the convenience of the prison's custody staff. [Order 1252, § 275-91-070, filed 11/21/77.]

STATEMENT OF THE CASE

At the time of his death, December 21, 1979, Arthur N. Roberts was an inmate at the Washington State Penitentiary (WSP). He was 35 years old, unmarried and without children. His mother (the petitioner) and three sisters survived him. He was considered to be marginally retarded.

Mr. Roberts had been housed until December 10, 1979 in the prison's Minimum Security Building (MSB). He was not considered a security risk.

On December 10, he complained of cardiac pain to a health care staff registered nurse (RN). A clinical examination was done. The RN noted that "he is 'afraid of heart' and wants to go downtown for a checkup." The RN's assessment included "R/O [rule out] angina" and his "plan" was that he be referred "to hospital for further work."

That same day he was seen by respondent Lingerfelt who diagnosed Mr. Roberts' medical complaint as probable "anxiety attack." She admitted having then seen the RN's note as to Mr. Roberts' request "to go downtown for a checkup."

Neither she nor the RN referred Mr. Roberts' request to the staff physician, Dr. George Kuzma, M.D., a family practice specialist.

On the next day, December 11, 1979, because he was complaining of illness and wouldn't work, Mr. Roberts was moved to the maximum security facility within the Penitentiary. Enroute to maximum security, Mr. Roberts collapsed and was placed in the prison infirmary. On admission, he was diagnosed as having cardiac pain.

While in the infirmary, he was seen by Dr. Kuzma who diagnosed an inflammation of the breastbone (costochondritis). Aspirin was prescribed.

On December 12, Mr. Roberts was discharged to the prison population (to his cell).

On both December 18 and December 19 he complained of cardiac pain to the health care specialist Douglas Biddle.

During the period from December 4 to December 19 Mr. Roberts' mother received 15 collect calls during which he complained that " . . . he was ill, that his arms hurt him, chest hurt him, and that he had asked for help and wasn't getting it." In his conversation of December 19 he told his mother "I know I'm going to die."

Mrs. Roberts testified that she had called Captain Moses at the prison and informed him that she "would pay for him [the decedent] going to a doctor downtown."

In the late evening before his death, Mr. Roberts again saw respondent and nurse practitioner Lingerfelt. His complaint of chest pain was diagnosed again as an "anxiety reaction" and a muscle spasm. No physical or workup for heart condition was given. At trial her recall was not clear as to Mr. Roberts' having again asked on December 20 for the opportunity to go downtown. However, reminded of her deposition testimony along that line, she acknowledged that "There could have been something to the effect that he said that."

In the early morning of December 21, 1979, Mr. Roberts died in his cell. An autopsy confirmed that he died of a completely blocked artery (cornonary arterial thrombosis).

At trial, cardiologists for both the petitioner and the respondent testified that Mr. Roberts would have benefited by cardiac treatment. Thus, the decedent was misunderstood by security personnel who changed his classification on December 10 in the belief he was malingering, and he was misdiagnosed by an RN, a nurse practitioner and a physician.

In December, 1979, there was no cardiologist or M.D. on the prison staff specializing in heart ailments. Prisoners needing cardiac care were to have been referred to private sector physicians in the local civilian community. Several were available.

By December, 1979, respondents Spalding, Naugler and Anderson had all been involved in a decision that seriously reduced inmate "downtown" visits to private physicians. On April 24, 1979 respondent Barbara Anderson issued a policy statement which read in part:

> Another area of concern is the increasing requests from residents for 'outside consultation at my own expense.' Unfortunately, these arrangements are not only financially tentative, but they fail to include costs for transportation and custody personnel.

> Hopefully, requests of this nature will diminish as confidence in the medical staff increases; in the meanwhile, we would like to propose another policy: 'Residents requesting additional medical services, other than is provided to them by the institution, will be financially responsible for all services privately contracted. The institution will not provide transportation and custody personnel for such appointments. Privately contracted physicians will be welcome to visit the institution on a prearranged basis and be extended full professional courtesy and assistance during their examination. All privately contracted physicians must be of good character and possess a full and unrestricted license issued by the State of Washington.'

As a consequence of that policy, private physicians were only allowed to treat inmates at the Penitentiary. Further, inmates were not provided custodial escort and thus were not provided access to such physicians' offices in the local community.

As a matter of fact, during the rest of 1979 no inmates were allowed to visit private physicians for supplemental medical care and no private physician came to the Penitentiary to provide supplemental care.

At the time the April 24, 1979 policy went into effect and thereafter until after Mr. Robert's death, the State did have Washington Administrative Code (WAC) provisions in effect which allowed specialized care. WAC 275-91-011(2) [see page 3] required "more than the minimum level of care" when an inmate had medical needs which, if not responded to, would "cause significant deterioration of the inmates' medical condition . . ."

On December 21, Mr. Roberts suffered a "significant deterioration." He died of an unattended medical condition. WAC 275-91-011 required that such a condition be cared for at State expense.

However, another WAC, 275-91-070 [see page 4], also allowed an inmate to get care beyond that provided by the Penitentiary. This WAC required that the inmate pay for the care and Mrs. Roberts offered to do so on December 12, 1979.

WAC 275-91-070, like WAC 275-91-011, contained a standard by which decisions regarding specialized care were to be made. The proposed treatment had to "comport[s] with sound medical or dental practice." At trial, this standard was interpreted by Dr. Kuzma to mean that the inmate had to show that he would possibly benefit by the specialized treatment he sought.

It was undisputed that Mr. Roberts would have benefited from cardiac treatment. By December 10, according to cardiologists who testified at trial, Mr. Roberts had exhibited symptoms consistent with heart disease. As a result, referral was indicated.

During the period of December 10 through December 20, 1979, when Mr. Roberts was requesting referral to a private physician, neither the RN he saw on the 10th, nor the nurse practitioner he saw on the 10th and again on the 20th, nor the physician he saw on the 11th knew of the procedure in WAC 275-91-070.

That procedure called for a referral by whichever health care professional received the inmate's request for supplemental care (request to see a private physician). These requests were supposed to be referred to a "doctor or dentist in the deparment's [Penitentiary] employ" who then was to make a discretionary decision, to-wit: did the request "comport[s] with sound medical or dental practice[?]"

However, the "doctor" (Dr. George Kuzma) couldn't implement the WAC because no one had told him or the other health care professionals that the WAC existed. Petitioner contended these persons were not told because of the policy issued in April 24, 1979 which essentially prohibited inmate visits to physicians.

During the same time period in 1979, the State also had WAC 275-91-050 [see page 4] in effect. This WAC severely limited "allied health care professional" care to "... conduct[ing] initial screening, treat[ing] minor illnesses, and do[ing] related tasks."

This WAC was ignored. RNs and nurse practitioners were used as primary health care providers. In particular, Mr. Roberts was seen by three allied health care professionals on December 10, by another allied health care professional on December 12, and by allied health care professionals on December 18, 19 and 20. Only on December 11 was he seen by a physician, Dr. Kuzma. At trial, Dr. Kuzma testified that he did not supervise these allied health care professionals and considered Mr. Roberts to be the patient of the allied health care professionals rather than his own patient.

The theory of petitioner's § 1983 due process complaint was that Mr. Roberts was deprived the opportunity to receive meaningful medical care without due process of law.

The theory of petitioner's § 1983 "liberty" right complaint was that, as to petitioner, WAC 275-91-070 created a legitimate expectation that his request for supplemental medical care would be processed and, indeed, approved; that this WAC represented a particularized standard and, again as to petitioner, a substantive limitation on official discretion.

Underlying all of this was petitioner's position that the Eighth Amendment guaranteed access to medical care necessary to the individual, rather than merely guaranteeing the general prison population access to medical care.

The Ninth Circuit concluded that WACs 275-91-011 and 275-91-070 allowed the rejection of his request "... for any constitutionally permissible reason or no reason at all..." and that these WACs offered only the possibility of the medical care Mr. Roberts sought.

In reaching these conclusions, the Court of Appeals failed to take into consideration Mr. Roberts' own medical history from December 10 to December 21 (*infra*, p. A-3 - A-5). Also, at trial, Dr. Kuzma testified that if asked, he would have allowed Mr. Roberts to go downtown for a second opinion.

Petitioner contends that the standard found in WACs 275-91-011 and 070 must be interpreted in light of the medical history the decedent had exhibited. Otherwise, substantive due process is not allowed to protect the fundamental right to life which was at stake here.

With respect to petitioner's equal protection argument (*infra*, p. A-17), the Court of Appeals concluded that WACs 275-91-011, 050 and 070 bore a rational relationship to a legitimate state interest and thus the Equal Protection Clause of the Fourteenth Amendment was not violated.

However, petitioner's argument was not against the WACs. Instead, petitioner complained that WAC 275-91-050 limited the role of allied health care professionals and the WAC was being ignored at WSP. Consequently, the petitioner's Constitutional right to equal protection, as compared to inmates at other State institutions, was being deprived.

With respect to petitioner's Eighth Amendment claims, the Circuit Court (*infra*, p. A-18) concluded that the deliberate indifference standard applied. However, here there was (and is) an irony: the petitioner was complaining that the imposition of Ms. Anderson's policy in April, 1979 was deliberately indifferent to the rights of the inmate population in general. The same argument was made with respect to the failure to restrict use of allied health care professional pursuant to WAC 275-91-050.

The petitioner could not show that Mr. Spalding (the Superintendent), Dr. Naugler (the State Medical Director) or Ms. Anderson (the Penitentiary Health Care Manager) even knew Mr. Roberts existed. Because the Court instructed the

jury that petitioner had to show these respondents were deliberately indifferent to Arthur N. Roberts in particular, it was impossible to show deliberate indifference.

Then, because the trial court would not separately instruct on a due process claim as not requiring a specific intent element, it was impossible to prove a due process claim.

Consequently, petitioner argued that the earlier class action in *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) wherein certification of a class containing Mr. Roberts and covering the time period in question was approved, should have been applied with a consequent ruling that there had been deliberate indifference as a matter of law. The Circuit court concluded that admission of that earlier finding may have been appropriate at trial (*infra*, p. A-19). However, the Circuit court also ruled, "The fact that a prison infirmary is systematically substandard does not logically preclude instances of constitutionally sufficient care."

The Circuit Court was, of course, correct in concluding that "constitutionally sufficient care" was possible. However, the Circuit Court never did address the issue as to just what degree of particularized type of medical care Arthur N. Roberts was constitutionally entitled to have access. That was, and is, the ultimate issue.

REASONS FOR GRANTING THE WRIT

I.

***Estelle v. Gamble* needs clarification as to 42 U.S.C. §1983 claim responsibility for state officials/administrators/employees who intentionally participate in institution's denial of access to adequate medical care.**

Estelle v. Gamble, 429 U.S. 97, 104, 105-06, 97 S. Ct. 285, 291, 291-92, 50 L. Ed. 2d 251 (1976) is in need of further clarification. *Estelle* currently excludes simple and even gross

negligence cases (malpractice) from § 1983 relief. These sorts of cases are routed to state courts for action on state-law basis. *Estelle* serves that purpose quite well.

Estelle also works well in situations wherein an inmate is making a complaint that a health care professional or custodial official, without any penal purpose, has intentionally deprived the inmate of medical care and consequently caused him unnecessary pain and suffering.

In cases such as *Hoptowit v. Ray*, supra, *Estelle* is used to establish class-based indifference, i.e., general deliberate indifference towards an institutional population. In that context, *Estelle* works well, too.

However, *Estelle* does nothing to guarantee an individual *access to meaningful medical care.* To the contrary, with regard to access the case is counterproductive.

When an individual inmate, such as Arthur N. Roberts, makes an individual. as opposed to class, claim regarding lack of access, the *Estelle* Eighth Amendment intent requirement seems to become superimposed upon the Fourteenth Amendment Due Process Clause elements of proof; the result is a due process claim with a *mens rea* intent requirement.

No Constitutionally protected right is more important than the right to life. But the factual situation of this case shows that such a right can be lost; moreover, that it can be lost by action and inaction of people who bore the decedent no ill will whatsoever. Said another way, it was not lost to individualized deliberate indifference.

However, Arthur N. Roberts' life was lost and, if the Circuit Court's opinion is affirmed, life will be lost again. Rather than establishing due process mechanisms intended to defend this sort of right against institutional practices which are not routinely trusted by Federal courts, *Estelle* currently creates a license to kill.

Allowing an individual inmate to bring an individual Due Process claim based upon a legitimate expectation based in State law (e.g. these WACs) is not going to open the floodgates to § 1983 litigation. That's the concern which really underlies the Circuit Court's opinion in this case. That is seen in the citation to *Hewitt v. Helms*, 459 U.S. 460, 471, 74 L. Ed. 2d 675, 103 S. Ct. 864, 871 (1983), "...It would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts,..."

In *Hoptowit v. Ray, supra*, at page 1253, the Ninth Circuit Court said:

> ...The Eighth Amendment requires that prison officials provide a system of ready access to adequate medical care. Prison officials show deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to the medical staff... Access to the medical staff has no meaning if the medical staff is not competent to deal with the prisoners' problems. The medical staff must be competent to examine prisoners and diagnose illnesses. It must be able to treat medical problems or refer prisoners to others who can...

The court thus required the states to provide a degree of access with or without regulations such as WAC 275-91-011 and 070. Having the regulations added nothing that already wasn't Constitutionally required. Had WAC 275-91-011 and 070 not required a procedural process to both control general access and abuse, as well as and allow needed access, the Court would have done so. *Haygood v. Younger*, 769 F.2d,1350-54 (9th Cir. 1985 *en banc*).

Estelle does not say an individual inmate cannot assert a due process claim based on access to adequate medical care. In the context of a class action, e.g. *Hoptowit v. Ray, supra*, the issue is easily avoided by a finding of deliberate indifference to inmate claims in general. In an inmate claim that needed medical care was deliberately withheld, as in *Estelle*, there is no due process issue.

However, when the state responds to constitutional requirements and attempts to establish due process mechanisms to balance an inmate's rights against state needs, e.g., WAC 275-91-011 and 070, and when defendants do not have actual notice of the inmate's claim of medical need (e.g. Spalding, Naugler and Anderson here), the current interpretation of *Estelle* effectively precludes an inmate from any action to enforce his due process rights.

In *Daniels v. Williams*, 474 U.S._____, 88 L.Ed. 2d 662, 673, 106 S.Ct. 662, 679 (1986) Mr. Justice Stevens said in his concurring opinion that "...it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty *without due process of law* — without adequate procedure." (Emphasis, the Court.) Unless *Estelle* is interpreted to allow an inmate to enforce a due process claim having to do with access to medical care, we must expect that institutions will continue to either create no procedures at all or ignore the ones which exist.

Certainly, no one intended Mr. Roberts' death. However, Mr. Spalding, Dr. Naugler and Ms. Anderson did intend to restrict inmate access to private physicians and did not intend to utilize allied health care professionals as primary health care providers. They did so without any effort whatsoever to amend the WACs which these practices violated. These were *deliberate* decisions of the sort well within *Daniels v. Williams* (pg. 668, L. Ed. 2d).

The jury was never allowed to determine that a deliberate decision to ignore WACs 275-91-050 and 070 was a proximate cause of Mr. Roberts' loss. Instead, this jury was asked to determine whether or not the respondents deliberately violated Arthur N. Roberts' Constitutional rights. The respondents defended by claiming they didn't even know Mr. Roberts and thus couldn't violate his individual rights.

Here, unlike the situation in *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101A S. Ct. 1908 (1981), no post-deprivation State tort remedy is adequate because Mr. Roberts died.

II.

The Ninth Circuit decision denying a Fourteenth Amendment Due Process Clause-protected, state-based liberty interest for supplemental medical care raises an important and unresolved issue.

There is no interest more vital to a penitentiary inmate than that of medical care, and particularly so for serious medical needs.

This Court has not previously considered what may be required for an inmate to be possessed of a Fourteenth Amendment, Due Process Clause-protected, "liberty interest" as to his medical care or, as in this case, as to supplemental medical care. The importance of that care, particularly in the light of the circumstances of this case, suggest the need for review by the Court.

In *Estelle v. Gamble, supra,* the Court said, in discussing medical care as related to the Eighth Amendment:

> These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce 'tortune or a lingering death', (citing *In re Kemmler,* 136 U.S. 436, 34 L. Ed. 519, 10 S. Ct. 930 (1890) . . . (L. Ed. 2d p. 259).

In the light of the Court's express recognition of medical care importance, serious question must be raised as to the Ninth Circuit's conclusion that WAC 275-91-070 "created only a 'hope' that supplemental care will be provided should a doctor determine that it is warranted." (*Infra,* p. A-15).

In a sense, Arthur Roberts experienced the "lingering death" mentioned in the *Estelle* quotation. In 15 collect calls to his mother in the 2½ weeks before his death he expressed concern as to his health and the lack of medical help he was receiving. Just two days before death he told her "I know I'm going to die."

Was WAC 275-91-070 a mere "hope" for or a "possibility" of supplemental medical care, as the Circuit Court concluded? Or did Mr. Roberts have a liberty interest in such care or, at the very least, in the processing of his requests of December 10th and 20th for supplementary medical care?

WAC 275-91-070 is entitled "Supplemental Care" and provides:

> Any inmate may, at his or her own expense, obtain medical or dental care additional to that mandated by the provisions of this chapter: *Provided*, That a doctor or dentist in the department's employ certifies that the proposal for supplemental treatment comports with sound medical or dental practice. . . .

The Circuit Court would relate the word "may" to the *proviso* clause. However, petitioner argues that "may" has absolutely nothing to do with that clause, but simply is the only verb available in providing the inmate, alone, the discretion to obtain supplemental care.

Further, the *proviso* furnishes a sufficiently specific standard by which the departmental doctor is to weigh the inmate's request. It must "comport[s] with sound medical . . . practice." While the specifics will vary with the medical condition involved, the section standard is as precise as possible. The impractical alternative would be to set out the "sound medical practice" for every conceivable medical condition.

The doctor's discretion clearly is not "unfettered." Each request must be weighed pursuant to the *proviso*. Had Mr. Robert's request come to him, Dr. Kuzma testified that he would have allowed him to go downtown for a second opinion. It never reached him to make that decision.

Petitioner urges that a further limitation on the doctor's discretion is found in the companion WAC 275-91-011 which pertains to care standards for an inmate. The physician receiving a request from an inmate must take into account the provisions of this WAC. In Mr. Roberts' case, referral to a cardiac specialist was indicated.

The Ninth Circuit has cited several liberty interest cases. Included are *Bauman v. Arizona Department of Corrections*, 754 F.2d 841, 844 (9th Cir. 1985); *Greenholtz v. Nebraska Penal Inmates*, 42 U.S. 1, 11, 60 L. Ed.2d 668, 99 S. Ct. 2100 (1979); and *Spruytte v. Walters*, 753 F.2d 498, 506 (6th Cir. 1985 *en banc*). Petitioner has no special quarrel with them. However, the interests involved do not equate with the interest in medical care.

Interests as to parole, remaining in the prison population, good-time credits, and others — all pale in comparison to the inmate's interest in medical care. For what good are these other interests if the inmate does not have his health or, in the case of Arthur Roberts, his life?

In *Spruytte* the Sixth Circuit found a liberty interest in the right of the inmate to receive a paperback used dictionary sent to him by his mother. The "standard" which allowed for the creation of the interest was a Michigan administrative rule which authorized the receipt of "any book . . . which does not present a threat to the order or security of the institution. . ."

Surely the supplemental medical care of an inmate is of vastly greater importance than the right to the receipt of a paperback dictionary. In each case an official is charged with a discretionary decision, but with limitations imposed by the specific standards enunciated.

Routinely, Federal courts apply that degree of due process which the individualized situation requires. In doing so, the "nature of the interest and effect" are considered and "the more important the interests the greater the effect of its impairment, the greater the procedural safeguards which the State must provide to satisfy due process." *Haygood v. Younger, Supra* 1353-54.).

CONCLUSION

Arthur N. Roberts had a "liberty" interest founded in a right of access to adequate medical care. The State codified that interest into WACs 275-91-011 and 070 and established a procedural mechanism to balance the interests of the State against those of the individual.

The State also limited the scope of care which could be provided by health care professionals who were not physicians; this was done by enactment of WAC 275-91-050.

Then, respondents Spalding, Naugler and Anderson deliberately ignored these WACs by a policy of restriction enacted in April, 1979 and by not informing medical staff that the WACs existed.

Consequently, when Mr. Roberts asked on December 10 and again on December 20 to be allowed to be seen by a private physician, no one referred him to the "doctor in the State's employ" who was supposed to determine whether or not his request "comported with sound medical practice."

Without any meaningful treatment for his true medical condition, Mr. Roberts died on December 21, 1979. He was exactly the sort of individual 42 U.S.C. § 1983 was enacted to protect. He was incarcerated and he was retarded. He was faced with a medical staff incapable of understanding his true medical need or attending to it. Instead, faced with the possibility, or perhaps even probability, that he was just another malingering inmate trying to get out of work, his symptoms were ignored.

His symptoms were ignored by well meaning people. They didn't set out to hurt Mr. Roberts and continued utilization of the *Estelle* standard rather than allowing individuals such as this to bring a Due Process claim inevitably means other inmates will suffer the same fate.

Recognition of a "liberty" interest claim of access to meaningful medical care restricted by the standard found in *Daniels* will open no floodgates of litigation; it will simply expand *Estelle*'s impact to situations such as this.

Respectfully submitted,

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July 14, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ETHEL A. ROBERTS, as Personal Representative of the Estate of Arthur N. Roberts, deceased, Plaintiff-Appellant/ Cross-Appellee. vs. JAMES SPALDING, as Superintendent of the Washington State Penitentiary, W. EDWARD NAUGLER, as Washington State Department of Institutions Medical Director, BARBARA ANDERSON, as Health Care Manager, Washington State Penitentiary, and JOYCE LINGERFELT, Nurse Practitioner, State of Washington, Defendants-Appellees/ Cross-Appellants.	Nos. 84-3752, 84-3825 D.C. No. C-82-1498 OPINION

Appeal from the United States District Court for the Western District of Washington
Honorable Jack E. Tanner, United States District Judge, Presiding

Argued and Submitted April 4, 1985
Seattle, Washington

Before: WRIGHT and KENNEDY, Circuit Judges, and MACBRIDE,* District Judge.

MacBride, District Judge:

The underlying action was brought under 42 U.S.C. § 1983 alleging that the medical care accorded appellant's decedent, an inmate at the Washington State Penitentiary, violated his eighth amendment rights, denied him equal protection of the laws, and denied him a state-created liberty interest without due process of law. This appeal principally challenges the district court's refusal to instruct the jury on appellant's due process and equal protection theories. On cross-appeal, appellees seek reversal of the district court's denial of their request for attorney's fees.

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* Honorable Thomas J. MacBride, Senior United States District Judge for the Eastern District of California, sitting by designation.

I. FACTS

The decedent, Arthur N. Roberts, was a thirty-five year old, slightly retarded inmate at the Washington State Penitentiary ("WSP") when he died of heart failure on December 21, 1979.

This appeal pertains to events that took place in the WSP infirmary from December 10 through 21, 1979. In effect during this time was a section of the Washington Administrative Code that stated:

> Any inmate may, at his or her own expense, obtain medical or dental care additional to that mandated by the provisions of this chapter: Provided, That a doctor or dentist in the department's employ certifies that the proposal for supplemental treatment comports with sound medical or dental practice. The time and place of the performance of the supplemental care are subject to the convenience of the prison's custody staff.

Wash. Admin. Code R. 275-91-070 (1977). On December 10, 1979, Roberts reported to the WSP infirmary complaining of chest pains.

He was examined by a registered nurse, Ronald Petrie, who performed tests and concluded that Roberts had no cardiac illness. Roberts stated that he wished "to go downtown for a check-up." The request was noted on the decedent's records, but was not referred to any doctor for consideration. Later that day, Roberts was treated by a nurse practitioner, Joyce Lingerfelt. Lingerfelt saw the notation regarding Roberts' request to "go downtown" but she took no action.

On December 11, 1979, Roberts was attended by Dr. Kuzma, an outside physician who did part-time contract work at WSP. Dr. Kuzma concluded on the basis of Roberts' complaints and test results that his pains were not of cardiac origin.

On December 18th, 19th, and 20th, Roberts again complained of chest pains. On December 20, 1979, he was again

attended by Nurse Practitioner Lingerfelt, to whom he apparently requested to "go downtown." She explained that he had been seen by a "downtown" physician, Dr. Kuzma. On December 21, 1979, Roberts was found dead in his cell. An autopsy determined the cause of death to be a completely blocked artery [coronary arterial thrombosis].

II. PROCEDURAL HISTORY

Trial was had in the district court before Judge Tanner. At trial, appellant sought to advance three distinct bases for recovery: (1) that the medical care accorded the decedent violated his eighth amendment right to be free from cruel and unusual punishment, (2) that WSP's use of unsupervised nurse practitioners to provide medical care to the decedent, a practice arguably unauthorized by then-existing regulations, denied the

decedent equal protection of the laws, and (3) that appellees' failure to process the decedent's request for supplemental health care denied him a state-created liberty interest without due process of law.

After a three-day trial, the court charged the jury on appellant's eighth amendment theory only. The court refused, over appellant's objections, to instruct the jury on the other theories advanced by appellant. So instructed, the jury returned a verdict in favor of all appellees. Appellees then requested attorney's fees, claiming that the litigation was frivolous. That request was denied. Both parties appeal. We have jurisdiction over these appeals pursuant to 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

We review the sufficiency of the jury instructions to determine whether, viewed

as a whole, the jury was adequately instructed on each element of the case. See Ragsdell v. Southern Pacific Transportation Co., 688 F.2d 1281, 1282 (9th Cir. 1982). A party is entitled to have her theories presented to the jury, so long as they are both legally correct and supported by the evidence. Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1398 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984).

IV. DUE PROCESS

A prison inmate has no independent constitutional right to outside medical care additional and supplemental to the medical care provided by the prison staff within the institution. See Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (prisoners have right to adequate medical care; deliberate indifference by the

prison staff to the serious medical needs of inmates constitutes cruel and unusual punishment in violation of the eighth amendment); accord Hoptowit v. Ray. 682 F.2d 1237, 1253 (9th Cir. 1982), on appeal after remand, Hoptowit v. Spellman, 753 F.2d 779 (9th Cir. 1985). Nonetheless, appellant claims that Wash. Admin. Code R. 275-91-070 (1977) vested the decedent with a "liberty interest" protected by the fourteenth amendment to the United States Constitution, and that by violating the regulation appellees deprived the decedent of his liberty interest without due process of law. Appellant's action is bottomed on 42 U.S.C. § 1983, which provides a federal cause of action against persons who, acting under color of state law, custom or usage, deprive a person of rights secured by the federal constitution and laws. The fourteenth amendment to the

federal constitution provides that no state shall deprive a citizen of "life, liberty, or property" without due process of law. Appellant argues that, given the state of the evidence, the court's failure to instruct the jury on her due process claim was in error.

State law can create a protected "liberty" interest by placing substantive limitations on the exercise of official discretion. Olim v. Wakinekona, 461 U.S. 238, 249 (1983); Hewitt v. Helms, 459 U.S. 460, 470-71 (1983); McFarland v. Cassady, 779 F.2d 1426, 1428 (9th Cir. 1986); Baumann v. Arizona Department of Corrections, 754 F.2d 841, 844 (9th Cir. 1985). For a liberty interest to be created in a state administrative regulation, the regulation must contain "'particularized standards or criteria [that] guide the State's decisionmakers.'" Olim, 461 U.S.

at 249 (citation omitted); Baumann, 754 F.2d at 844. If, however, "the decision-maker is not 'required to base its decision on objective and defined criteria,'" but may instead "'deny the requested relief for any constitutionally permissible reason or for no reason at all,' the State has not created a constitutionally protected liberty interest." Olim, 461 U.S. at 249 (citation omitted).

The state's use of guidelines to "structure the exercise" of the decisionmaker's discretion does not necessarily create a protected interest. Baumann v. Arizona Department of Corrections, 754 F.2d 841, 844 (9th Cir. 1985). Thus, the fact that a regulation imposes a residuum of restraint on the otherwise "unfettered," see Olim, 461 U.S. at 249, discretion of a decisionmaker is

not determinative of whether a protected interest has been created. Id. This position accords with our belief in the correctness of extending expanded procedural guarantees to incarcerated individuals, for as the Supreme Court has stated:

> The creation of procedural guidelines to channel the decision-making of prison officials is, in the view of many experts in the field, a salutary development. It would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the structures of the Due Process Clause.

Hewitt v. Helms, 459 U.S. 460, 471 (1983).

"A mere expectation of receiving a benefit is not enough to create a protected interest." Spruytte v. Walters, 753 F.2d 498, 506 (6th Cir. 1985), cert.

denied, ___ S. Ct. ___, Mem. No. 84-1800 (Jan. 13, 1986). To claim a protected interest in a benefit, "[one] must 'have a legitimate claim of entitlement to it.'" Id. at 506-507 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

In Wright v. Enomoto, 462 F.Supp. 397 (N.D. Cal. 1976) (3 judge court), summarily aff'd, 434 U.S. 1052 (1978), a protected liberty interest was found when an administrative regulation conditioned inmate segregation on a decisionmaker's "reasonabl[e] belie[f] that [the inmates] are a menace to themselves and others or a threat to the security of the institution." Id. at 403.[1] The protectable interest

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[1] The regulation provided in pertinent part:

> Inmates must be segregated from others when it is reasonably believed that they are a menace to themselves and others or a threat to the

that the court found was "in not being confined in maximum security segregation unless [the inmate] is found, for clearly documented reasons, to come within the standard set by the rules." Id. (emphasis added).

Similarly, in Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985), cert. denied, _____ S.Ct. _____, Mem. No. 84-1800 (Jan. 13, 1986), the court found that a protectable interest was created by a regulation that conditioned the denial of mailed books and periodicals to inmates finding a finding that the publication "present[s] a threat to the order or

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> security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken.

Wright v. Enomoto, 462 F. Supp. at 403.

security of the institution or to resident rehabilitation." Id. at 505. In Spruytte, due process was implicated because a decisionmaker's finding that an individual book presented a threat to security was a "specific substantive predicate" to withholding of the book from the prisoner. Id. at 508.

In contrast to the regulations in Spruytte and Wright v. Enomoto, Wash. Admin. Code R. 275-91-070 provides that an inmate "may" obtain supplemental medical care, "[p]rovided, [t]hat" a doctor certifies that the inmate's request for supplemental care "comports with sound medical . . . practice." The words "may" and "provided," considered in the context of the regulation, indicate that the regulation does not create a "right or justifiable expectation" that can be denied only upon the application of

defined and objective criteria. Vitek v. Jones, 445 U.S. 480, 489 (1980). Rather than conditioning denial of supplemental care upon a negative finding made in the exercise of the doctor's professional medical judgment, see Spruytte, 753 F.2d at 508, the regulation creates in the inmate only a "hope" that supplemental care will be provided should a doctor determine that it is warranted. See Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 11 (1979).

That the state holds out this possibility of outside medical care does not mean that a liberty interest has been created. See id. The doctor's discretion to determine that supplemental medical care is not warranted remains essentially unfettered. He or she need not articulate a "specific, substantive predicate" to the denial of supplemental

care. In fact, the regulation requires that a doctor certify the inmate's proposal for supplemental care as consistent with sound medical practice before the inmate can be granted the requested care. As such, the regulation creates no protected entitlement or liberty interest and the 14th amendment is not implicated. Compare McFarland, 779 F.2d at 1428 (none of the Arizona statutes and regulations concerning administrative segregation contain mandatory language sufficient to create liberty interest in remaining in general prison population) with id. (use of mandatory language creates liberty interest in the receipt of good-time credits). See also Baumann, 754 F.2d at 844. Accordingly, it was not error for the district court to refuse to

instruct the jury on appellant's due process theory.[2]

V. EQUAL PROTECTION

Appellant rather weakly suggests that the system of medical care and medical care access articulated in Wash. Admin. Code Regulations 275-91-011, 275-91-050, & 275-91-070 (1977) violated the decedent's right to equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution. See U.S. Const. amend. XIV, § 1. The system of medical care provided by the regulations

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[2] We also reject appellant's contention that a "liberty" interest was created by Wash. Admin. Code Regulations 275-91-011 (1977) & 275-91-050 (1977). Appellant makes no showing that these regulations created in the decedent a "'right or justifiable expectation' rooted in state law," Garcia v. De Batista, 642 F.2d 11, 14 (1st Cir. 1981) (quoting Vitek v. Jones, 445 U.S. 480, 489 (1980)), and we do not so find.

violates equal protection only if it bears no rational relationship to a legitimate state interest. See Dandridge v. Williams, 397 U.S. 471, 485-86 (1970); Baumann v. Arizona Department of Corrections, 754 F.2d 841, 846 (9th Cir. 1985).

Appellant suggests no basis for a finding that the policies expressed in the regulations, or the regulations themselves, are deficient constitutionally. The regulations appear to be reasonable related to the provision of adequate medical care to prison inmates consistent with the legitimate security and financial needs of the institution. Accordingly, we reject appellant's contention that the district court's refusal to instruct the jury on her equal protection theory was in error.

VI. CRUEL AND UNUSUAL PUNISHMENT

Appellant argues that since the decedent, Mr. Roberts, was a member of the

class in Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982), on appeal after remand, Hoptowit v. Spellman, 753 F.2d 779 (9th Cir. 1985), in which it was determined that the conditions and access to medical care at WSP were "cruel and unusual" in violation of the eighth amendment, she was entitled to a directed verdict on liability with regard to at least some appellees on her eighth amendment claim. While admission of that adjudication and the affirmed factual findings may have been appropriate at trial to prove bad conditions, established practice, or notice of constitutionally substandard conditions to prison officials, see Plaintiff's Trial Memorandum, Excerpt of Record (E.R.) tab Y, at 271-72, the Hoptowit decision does not in itself compel the conclusion that the care afforded Roberts was constitutionally

deficient. Care may be variable; some prisoners may receive no care while others may be accorded competent or even superlative care. The fact that a prison infirmary is systematically substandard does not logically preclude instances of constitutionally sufficient care.

The jury was instructed that, in order to sustain her eighth amendment claim, appellant had to prove that WSP's alleged denial of access to adequate medical care was the result of deliberate indifference to the decedent's serious medical needs. The standard articulated by the district court is the proper standard to be applied in eighth amendment analysis. Estelle v. Gamble, 429 U.S. 97, 104, 105-06 (1976); Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982), on appeal after remand, Hoptowit v. Spellman, 753 F.2d 779 (9th Cir. 1985); see also e.g.,

Haygood v. Younger, 769 F.2d 1350, 1354-55 (9th Cir. 1985) (en banc) (detention beyond termination of prisoner's sentence held cruel and unusual), petition for cert. filed, 54 U.S.L.W. 3489 (U.S. Jan. 21, 1986) (No. 85-908). Accordingly, we uphold the district court's instructions with regard to appellant's eighth amendment claim.

VII. APPELLANT'S OTHER CLAIMS

Appellant objects to the district court's failure to charge the jury with certain instructions or parts of instructions proposed by appellant. See Brief of Appellant at 6-9. As previously indicated in Section III, supra, we review the instructions given by the court to determine whether, viewed as a whole, they adequately instructed the jury on each element of the case. A party is not entitled to have her theories presented to

the jury unless they are both legally correct and supported by the evidence. Even then,

> A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented.

Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1398 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984). Thus, the district court was under no duty to submit to the jury proposed instructions that contain either a misstatement of the law or a theory not supported by the evidence, or that are otherwise incomplete or improper.

Appellant's proposed instructions 5, 9, and 10 contain improper, incorrect, or incomplete theories of law under the fifth, the eighth, and the fourteenth

amendments. Proposed instruction 5 fails to set forth the proper standard of deliberate indifference to be applied to her eighth amendment claim. See Estelle v. Gamble, 429 U.S 97, 103-04 (1976). Proposed instruction 9 also fails to set forth the appropriate deliberate indifference standard for appellant's eighth amendment claim. Further, the proposed instruction contains references to appellant's due process and equal protection theories, which were unsupported by the evidence. See supra Sections IV & V. Proposed instruction 10 is misleading because it indicates that willfulness or intent is not a required element of appellant's eighth amendment claim. See Estelle v. Gamble, 429 U.S. at 105-06; Haygood v. Younger, 769 F.2d at 1354-55. Accordingly, the instructions were properly rejected by the district court.

Appellant's proposed instruction 11 is improper since it directs the jury to find that "all acts done by all defendants towards Arthur N. Roberts were done under color of state law." This was a question of fact for the jury to decide. Appellant's proposed instruction 11-A was properly rejected, since the court instructed the jury concerning acts under color of state law. See Reporter's Transcript of Proceedings, Vol. IV, at 4-5.

Appellant's proposed instruction 12 purports to summarize Wash. Admin. Code R. 275-91-070 (1977). This instruction was unnecessary, since the regulation was introduced as plaintiff's exhibit 84. E.R. at 776. Furthermore, the proposed instruction directs the jury to find that the regulation entitled the decedent to have his request for supplemental care

processed to a decision by a doctor. This contention was factually disputed at trial, and to the extent that it relates to appellant's due process theory of liability, was properly rejected by the district court.

For similar reasons we uphold the district court's rejection of appellant's proposed instruction 13, which summarizes Wash. Admin. Code R. 275-91-050 (1977). The instruction was unnecessary since the regulation was introduced along with Wash. Admin. Code R. 275-91-070, supra, as plaintiff's exhibit 84. Furthermore, the proposed instruction directs the jury to conclusions regarding factual matters that were the subject of dispute at trial.

The district court properly rejected appellant's proposed instructions 14, 14-A, and 14-B, since the instructions direct the jury to find for the appellant

on her due process and eighth amendment claims. Finally, we reject as irrelevant appellant's objection to the court's refusal to charge the jury with appellant's proposed instruction 22, which pertains to th awarding of nominal damages.

VIII. ATTORNEY'S FEES

Appellees, the defendants below, cross-appeal the district court's denial of their motion for award of attorney's fees. Pursuant to 42 U.S.C. § 1988, defendants prevailing in civil rights actions are to be awarded attorney's fees "'not routinely, not simply because [they] succeed, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'" Mayer v. Wedgewood Neighborhood Coalition, 707 F.2d 1020, 1021 (9th Cir. 1983) (quoting

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (Title VII case)).

In its order denying appellee's motion, the district court found that "Plaintiff's [eighth amendment] cause of action was not unreasonable, frivolous, or vexatious but was of sufficient merit to proceed to the jury." E.R. tab PP, at 527. The district court's finding is well-supported by the evidence, and will not be disturbed. Thus, we uphold the district court's denial of attorney's fees to appellees.

Accordingly, the judgment and order of the district court are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ETHEL A. ROBERTS, as Personal Representative of the Estate of Arthur N. Roberts, deceased,	)	
Plaintiff-Appellant/ Cross-Appellee,	)	Nos. 84-3752, 84-3825
vs.	)	D.C. No. C-82-1498
JAMES SPALDING, as Superintendent of the Washington State Penitentiary, W. EDWARD NAUGLER, as Washington State Department of Institutions Medical Director, BARBARA ANDERSON, as Health Care Manager, Washington State Penitentiary, and JOYCE LINGERFELT, Nurse Practitioner, State of Washington,	)	ORDER
Defendants-Appellees/ Cross-Appellants.	)	

Appeal from the United States District Court for the Western District of Washington

Before: WRIGHT and KENNEDY, Circuit Judges, and MACBRIDE,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Kennedy has voted to reject the suggestion for a rehearing en banc, and Judges Wright and MacBride have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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* Thomas J. MacBride, Senior U.S. District Judge for the Eastern District of California, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF WASHINGTON AT TACOMA

ETHEL A. ROBERTS et al	) CIVIL ACTION
	) FILE NO.
vs.	) C82-1498CT
	)
JAMES SPALDING et al	) JUDGMENT ON
	) JURY VERDICT
	)

This action came on for trial before the Court and a jury, Honorable JACK E. TANNER, United States District Judge, presiding. The issues have been duly tried and the jury having duly rendered its verdict, it is ordered and adjudged that the plaintiff take nothing and that the action be dismissed on the merits.

Dated at Tacoma, Washington this 20th day of January, 1984.

BRUCE RIFKIN

s/ Debby Harrison
Deputy/Clerk of the Court

Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-78 (2)

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1986

ETHEL A. ROBERTS,
Personal Representative of the Estate
of Arthur N. Roberts, Deceased,

Petitioner,

v.

JAMES SPALDING, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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20 pp

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
Introduction: Nature of Petitioners Claim	1
Counterstatement of the Facts	2
REASONS WHY THE PETITION SHOULD BE DENIED	7
I The Ninth Circuit Court of Appeals was correct in determining that the state regulations in question did not create independent, individual, liberty interests or rights	9
II The court should not expand the standards in *Olim* and *Hewitt* to create the type of right sought to be established	12
III There is no need to accept review of this case in order to "clarify" *Estelle v. Gamble*	14
CONCLUSION	16
APPENDIX A	A-1

TABLE OF AUTHORITIES

CASES: *Page*

Baumann v. Arizona Dept. of Corrections, 754-F.2d 841, 844 (9th Cir. 1985) 12

Connecticut Board of Pardons v. Dumschat, 452, U.S. 458 (1981) 9, 11

Daniels v. Williams, 474 U.S. ____ (1986) Slip Opinion 54 USLW 4095 ..... 13, 14

Davidson v. Cannon, 474 U.S. ____ (1986) Slip Opinion 54 USLW 4090 ..... 13, 15

Estelle v. Gamble, 429 U.S. 97 (1976) 2, 8, 14

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) 11, 12

Hewitt v. Helms, 459 U.S. 460 (1983) 1, 8, 10, 12

Hoptowit v. Ray, 682 F.2d 1237, (9th Cir. 1980) 3, 14

McFarland v. Cassady, 779 F.2d 1426, (9th Cir. 1986). 12

Meachum v. Fano, 427 U.S. 215 (1976) 9, 11, 12

Montanye v. Haymes, 427 U.S. 236 (1976) 9, 11, 12

Olim v. Wakinekona, 461 U.S. 238 (1983) 1, 8, 10, 12

Parat v. Taylor, 451 U.S. 527 (1981) 13

Spaziano v. Florida, 468 U.S. 447 (1984) 14, 15

Sproytte v. Walters, 753 F.2d 498, (6th Cir. 1985) 12

Vitek v. Jones, 445 U.S. 480 (1980) 9, 11

Whitley v. Albers, 475 U.S. ____ (1986) Slip Opinion 54 USLW 4236 ..... 14, 15

FEDERAL STATUTES:

42 U.S.C. § 1983 2

Eighth Amendment, United States Constitution 8

Fourteenth Amendment, United States Constitution ... 7

STATE STATUTES:

Washington Administrative Code 275-91-050 6

No. 87-78

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

ETHEL A. ROBERTS,
Personal Representative of the Estate
of Arthur N. Roberts, Deceased,

Petitioner,

v.

JAMES SPALDING, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

INTRODUCTION: NATURE OF PETITIONERS CLAIM

The principal issue in this Petition for Certiorari is whether two state administrative regulations (WAC 275-91-050, WAC 275-91-070 Appendix A) regarding medical care at the state prisons create an enforceable individual liberty interest under the standards set forth in *Olim v. Wakinekona*, 461 U.S. 238 (1983) (hereinafter referred to as *Olim*), and *Hewitt v. Helms*, 459 U.S. 460 (1983), (hereinafter referred to as *Hewitt).*

The Petitioner contends that both the District Court and the Ninth Circuit Court of Appeals erroneously failed to recognize a state-created right "to access to meaningful medical care" arising from those regulations. The Ninth Circuit determined that the regulations did not create an enforceable liberty interest. One regulation, WAC 275-91-070, authorized only the possibility of supplemental medical care, over and above that which was provided by the prison. It did not create a right to or expectation of supplemental care, nor did it limit or restrict state decision making in a manner that would create enforceable individual rights. The other regulation, WAC 275-91-050, related to the supervision of "allied health professionals." It likewise did not create individual rights. The Petitioner claims that the Ninth Circuit was incorrect and suggests that it is necessary for this Court to clarify *Estelle v. Gamble*, 429 U.S. 97 (1976) (hereinafter referred to as *Estelle*), in the light of the facts in this case.

COUNTERSTATEMENT OF THE FACTS

Petitioner's argumentative recitation of selected evidence presented at trial distracts from the principal issue before this Court and paints a misleading picture of both the events prior to Mr. Robert's death, and the level of medical service actually provided on a continuous basis at the institution. The following information therefore is submitted to fill in the gaps in Petitioner's presentation and to clarify certain incorrect conclusionary statements.

The underlying case was brought under 42 U.S.C. § 1983. Petitioner challenged the adequacy of medical treatment afforded to Mr. Roberts prior to his death at the Washington State Penitentiary on December 21, 1979. It was alleged that the medical care violated his Eighth Amendment rights, denied him equal protection of the law, and deprived him of a state-created liberty interest without due process. The due process claim was based on the theory that the administrative regulations created a

right which could not be taken away without a violation of due process requirements. Petitioner also brought an action under state law for negligence and medical malpractice. These state claims were dropped the day before trial.

The case went to trial only on the issue of whether there was a violation of Mr. Robert's Eighth Amendment rights. The District Court Judge refused to submit the Equal Protection and Due Process claims to the jury.[1] The jury returned a verdict in favor of the defendants on the Eighth Amendment claim.

Petitioner appealed the District Court refusal to instruct on the Due Process and Equal Protection claims to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the District Court ruling that the regulations in question did not establish the type of individual rights or interest necessary to support a due process claim.[2] This Petition asks this Court to recognize the alleged state created rights.

The trial of the Eighth Amendment claim focused on the medical treatment provided to Mr. Roberts. The evidence indicated that Mr. Roberts had been a frequent visitor to the medical facility during 1979. He had been seen forty-six times between March and October for various conditions unrelated to the chest pain. He was seen at the clinic on November 29, 1986, approximately two weeks prior to the first incident referred to by Petitioners, complaining of chest pains and sinus congestion. He was given a complete exam by a nurse practitioner including chest

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[1]The Court also refused a request for directed verdict in favor of Petitioner based on the Ninth Circuit determination in *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1980). Petitioner contended that it was unnecessary to establish an individual Eighth Amendment violation in order to recover damages since the Ninth Circuit had found a class based institutional violation during the same time period.

[2]The Ninth Circuit affirmed the District Court rejection of the alleged Equal Protection claim. The opinion noted that Plaintiff had been unable to establish that the regulations themselves were constitutionally deficient. The District Court refusal to direct a verdict based on *Hoptowit v. Ray, supra*, was also affirmed.

X-rays and an EKG. All tests indicated that he had no life threatening heart disease.

He did have an apparent re-occurrence of these symptoms on December 10, 1979, but Petitioner fails to mention that he was given an EKG and a cardiac enzyme test at that time by staff. None of the tests given indicated that he had any imminent heart related problems.

Mr. Roberts was admitted to the infirmary on December 11, 1979, for observation, and was examined by Dr. Kuzma. He was again given an EKG test which was found to be normal.[3] Dr. Kuzma's opinion from the examination and test results was that Mr. Roberts was not suffering from a life threatening heart related problem. Mr. Roberts was released from the infirmary on December 12, 1979, when his symptoms had abated.

Mr. Roberts did experience similar symptoms approximately one week later and was again examined at the clinic. The nurse practitioner performed a limited examination and concluded that the symptoms were similar to those exhibited on the two previous occasions. She decided, therefore, not to perform an EKG or other heart tests and did not consult with either Dr. Kuzma or any other available physician. Mr. Roberts returned to his cell and later died of a coronary arterial thrombosis on December 21, 1979.

Petitioner did not mention that all expert testimony at trial, including an expert presented by Petitioner, concluded that neither the medical staff nor Dr. Kuzma were negligent or committed any malpractice in their treatment of Mr. Roberts.[4] The prospect of this uncontroverted evi-

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[3]Dr. Kuzma was misidentified by Petitioner as a "staff physician." He was actually a physician in private practice in Walla Walla who performed certain medical services on a periodic basis under a contract with the State.

[4]Testimony of *Dr. Hall,* (RP Vol. III, p. 73, line 2, p. 74, lines 15-18, p. 76, line 15-25; p. 77, lines 6-11); testimony of *Rosemary Pittman,* (RP Vol. III, p. 157, lines 4-16); testimony of *Dr. Levenson,* (RP Vol. III, p. 156, line 6 through p. 157, line 7); testimony of *Dr. Kuzma,* (RP Vol. II, p. 128, lines 9-14).

dence was undoubtedly the basis for dropping the medical malpractice claim immediately prior to trial.

Regarding the structure for delivery of medical services at the prison, Petitioner likewise has presented an incomplete picture. An understanding of this structure is essential to clarify some of Petitioner's misstatements regarding issues of compliance with the regulations. The institution was going through an evolution in the structure of its medical services delivery system at the time of Mr. Robert's treatment. Prior to 1979, the institution maintained a small staff of physicians and nurses on site, who attempted to provide a full range of services. Private or "downtown" physicians were only used in limited situations. The regulations in question were established in 1977 in the context of this type of delivery system. In 1979 the institution began a transition to a new delivery structure which provided for more extensive use of private physicians in the area. The prison reduced the number of staff physicians and contracted with a number of private or "downtown" physicians to come to the penitentiary on a periodic or scheduled basis to provide medical services. The prison also hired nurse practitioners in addition to the nursing staff to provide examination and treatment consistent with their training. Through this new program, the prison was able to use the services of a broader range of expert physician assistance. This broader range of physicians' services could also be utilized in a secure setting behind the walls.[5] In other words, the prison increased access to "downtown" physicians, but reduced the number of trips downtown. Dr. Kuzma was one of the contract physicians in this new medical service delivery system. He was a family practice specialist in private practice in the Walla Walla area.

It is against this general background that Petitioner at trial raised questions about compliance with the regula-

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[5]Security was an important logistical problem to both the private physicians and the community.

tions. Petitioner contended the prison had not complied with the regulations in Mr. Robert's case. It was further suggested that prison officials had systematically denied access to supplemental care in all situations for all inmates.

There was considerable dispute at trial about whether the regulations in question had been complied with. More specifically the parties disagreed as to whether WAC 275-91-050 regarding "allied health professionals" applied to the new job of nurse practitioner. Petitioner contended that the nurse practitioner was not authorized to provide any form of treatment unless supervised by a physician. Defendant maintained that the regulation wasn't applicable to nurse practitioners. The parties also disagreed as to whether there had been an actual viable request for supplemental care, which had not been processed by staff. Petitioner contended that the evidence indicated a clear, unmistakeable request for care by a downtown physician over and above the medical care available at the time at the penitentiary. The evidence, however, was very ambiguous. Both Mr. Roberts and his mother orally requested to see a "downtown" physician. He actually did see a "downtown" physician, Dr. Kuzma, although the exam was at the penitentiary. Neither during nor after the exam by Dr. Kuzma, was there renewed request to see any other physician.[6] There was also no evidence that Mr. Roberts or anyone on his behalf independently contacted any local physicians to arrange supplemental care. As a result, the nurse practitioner, to whom the request had been made, simply assumed that Mr. Roberts had been requesting to see the contract physician, and that his request was satisfied when the doctor did see him. The defendants there-

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[6]There is ambiguous testimony that on December 19 or 20, Mr. Roberts requested to see a downtown physician. The nurse practitioner made the decision that it was unnecessary to consult with any of the contract physicians. This decision was not considered negligent by any expert witnesses. See Fn. 4.

fore maintained that there was in effect compliance with the regulations.

Petitioner has also attempted to create the inference that the prison systematically denied access to supplemental care to any inmate during this time period. There was no evidence to support this allegation. Petitioner appears to be misrepresenting the available evidence to create this inference. The policy statement of April 24, 1979, which controlled the access to downtown visits for treatment in addition to that provided by the institution, must be read in the context of the revised structure. The prison was providing more access to "downtown" physicians at the penitentiary as part of its normal services. There was a reduced need to send inmates downtown for either primary or supplementary treatment. Furthermore, the policy itself did not preclude supplemental care, nor was it implemented in a manner that precluded such care. It is true, after this policy went into effect, there were no requests by inmates to have prearranged supplemental care. But, Petitioner's stated conclusion that "no inmates were allowed" to visit private physicians is completely unwarranted.

In fact, it is unfortunate that Petitioner has sought to get the Court's attention, not by the merits of their legal argument, but by incomplete facts and inappropriate conclusionary statements.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner is seeking to establish a new standard for prisoner medical care in the State of Washington. It is contended that prisoners have a liberty interest or right "to access to meaningful medical care." It is further contended that state officials may not deprive prisoners of this right without due process under the Fourteenth Amendment to the Constitution. The scope of this alleged right is exceedingly vague and ambiguous, but it appears to im-

pose on state officials a higher standard of care than the Eighth Amendment standard and the negligence standard under state tort law. The principal source of this alleged new right is two state regulations regarding medical care at prisons. (Appendix A). Petitioner claims that these regulations create enforceable individual rights under the standards outlined in *Olim*, and *Hewitt, supra.*

Petitioner also appears to suggest that *Estelle v. Gamble, supra,* itself should be modified to reflect this new right.

These contentions are without merit. There is no basis either in *Olim* or *Hewitt, supra,* or in *Estelle* for the creation of the alleged new right in the present situation. The clear standards outlined in *Olim* and *Hewitt, supra,* leave no doubt that the state regulations (Appendix A) do *not* create the type of individual rights or liberty interests necessary to establish a constitutional Due Process requirement. It also would be inappropriate for the Court to expand those standards to accommodate Petitioners' claimed right.

If the standards were stretched in this case, there would be a substantial expansion in the scope of state created "rights" subject to due process analysis in other contexts. This expansion would not only create a substantial burden on the states to accommodate such rights, but would substantially restrict state discretion. Such an expansion is completely unwarranted in this situation, especially where there are other adequate remedies available to prisoner. The Ninth Circuit Court of Appeals was correct in rejecting this contention.

In addition, there is no compelling need to modify *Estelle* to establish the new right sought by Petitioner. In the present case, Petitioner pursued both the Eighth Amendment and State Tort Claim remedies. The Eighth Amendment Claim was unsuccessful and the tort claims were dropped prior to trial. The recognition of the type of ambiguous right sought by Petitioner in addition to the other rights would substantially increase the duty of care by

prison officials. In fact, it approaches an almost strict liability standard. Petitioner seems to contend that the State should be liable in any situation, where in retrospect, additional treatment may have been beneficial, whether or not there has been any negligence. There is no compelling need to make this quantum leap in the duty of care. The standard in *Estelle* has consistently been recognized as an appropriate balance of respective interests. Furthermore, the availability of a malpractice remedy under tort laws ensures that the duty of care will be consistent with the standards applicable in the non-prison setting. The creation of this new right is therefore unnecessary and inappropriate, especially in a fact situation where the state officials have complied with the Eighth Amendment and have not been found negligent.

I

The Ninth Circuit Court of Appeals was correct in determining that the state regulations in question did not create independent, individual, liberty interests or rights.

Petitioner claims that the state regulations in Appendix A created the so-called right "to access to meaningful medical care." It was further alleged that Petitioner could not be deprived of this right without due process. Neither the District Court nor the Ninth Circuit Court of Appeals recognized this right, and Petitioner requests this Court to review that decision.

The Ninth Circuit Court of Appeals carefully followed the guidelines stated by this Court in *Olim* and *Hewitt, supra.* Those guidelines have been hammered out in a series of cases, including *Meachum v. Fano,* 427 U.S. 215 (1976); *Montanye v. Haymes,* 427 U.S. 236 (1976); *Connectucut Board of Pardons v. Dumschat,* 452 U.S. 458 (1981); *Vitek v. Jones,* 445 U.S. 480 (1980). Statutes and regulations which govern the day-to-day administration of

a prison system are not generally the type of provisions that create individual liberty interests or rights. Prison officials have been given considerable latitude and discretion in managing institutions.

In order to support a claim that the State has created an individual right or liberty interest, there must be a clear indication that the statutes and regulations place substantive limitations on official discretion. In other words, the provisions must establish particularized standards to limit state decisionmakers.

The opinion in *Hewit, supra,* emphasizes that the provisions must actually limit state discretion. The mere creation of procedural guidelines to channel official decisionmaking is insufficient without more to trigger the substantive protections of the Fourteenth Amendment.

The facts in both *Hewitt* and *Olim, supra,* illustrate this standard. *Hewitt* involved state statutes and a regulation which restricted the prison officials' ability to assign prisoners to administrative segregation. A prisoner could be placed in segregation only in specific situations and for limited time periods.[7] Prison officials did not therefore have unlimited discretion in assigning and retaining the prisoner in that status. The opinion in *Hewitt* emphasizes that the statutory language is unmistakeably mandatory in character, e.g., shall, must or will. See 459 U.S. 471. The Court ruled that the mandatory and limiting statutory language went beyond mere procedural guidelines and established the type of interest or right which triggers a due process analysis.[8]

In *Olim,* however, the Court found that the regulations did not limit the prison administrator's discretion. The inmate was challenging an administrative decision

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[7]A hearing was required if any disciplinary action was to be taken; in no event could the restriction be more than ten days without a hearing.

[8]The Court went on to rule that the procedures contained therein satisfied due process requirements. See 459 U.S. 477.

transferring him from the Hawaii prison system to a California prison. The administrator's decision was part of a transfer process created by state regulations. The Court determined that the regulation did not confer a right on the prisoner to remain in the first prison to which he was assigned, defeasible only upon proof of specific acts of misconduct. The State retained the discretion to transfer for any reason. There were no conditions or limits imposed on the discretionary power. Under these circumstances, Hawaii did not create an individual liberty interest protectable under the Due Process Clause.

The standards in *Olim* and *Hewitt* do not constitute a new direction, but are simply the most recent application of what has been a consistent standard. See for instance, *Connecticut Board of Pardons v. Dumschat, supra;*[9] *Meachum v. Fano, supra; Montanye v. Haymes, supra;*[10] *Greenholtz v. Nebraska Penal Inmates;* 442 U.S. 1 (1979);[11] *Vitek v. Jones, supra;*[12]

The Ninth Circuit Court of Appeals correctly applied the standard in this case. The regulations in question do not purport to create a right, nor do they limit the exercise of state discretion. The regulation regarding the supplemental medical care creates an opportunity to receive supplemental care rather than a right. The language is not

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[9]State statutes authorizing the State Board of Pardons to commute life sentences did not create a right or expectation of commutation. The statute at most created an opportunity to appeal for clemency, and state discretion was not limited.

[10]In both *Meachum* and *Montayne*, it was determined that the state statutes did not confer a right to remain in a particular institution, defeasible only upon specific acts of misconduct. The discretion of prison officials was also not limited by these statutes.

[11]Statutes establishing a system of parole did create a liberty interest. The statutes created a specific right or expectation to parole that could not be denied unless there was a specific determination that certain conditions were applicable.

[12]Under Nebraska statutes, prisoners could not be transferred to a mental hospital unless there was a specific determination that a person was mentally ill. State discretion was therefore limited.

mandatory. Compare *Hewitt*. The provision also does not limit state discretion in any way. Similarly, the regulation regarding supervision is not mandatory and does not limit state discretion. See *Greenholtz, Olim, Meachum, Montayne, supra.*

The Ninth Circuit Decision was consistent with the disposition of this issue in other Ninth Circuit cases and in other circuits. See, for instance, *Sproytte v. Walters,* 753 F.2d 498 (6th Cir. 1985); *Baumann v. Arizona Dept. of Corrections,* 754 F2d 841, 844 (9th Cir. 1985); *McFarland v. Cassady,* 779 F.2d 1426 (9th Cir. 1986).

In conclusion, the Ninth Circuit applied the standards outlined by this Court in precisely the manner intended. Unless this Court believes that a new direction should be established, the petition should be denied.

II

The Court Should Not Expand The Standards in *Olim* and *Hewitt* To Create The Type of Right Sought To Be Established

In order to establish the type of right that would trigger a Due Process analysis, this Court would have to substantially expand the standards outlined in *Olim* and *Hewitt, supra.* In effect, the Court would have to overrule that entire line of cases. See P. 9.

This would reflect a major change in direction and would have substantial implications in other areas. If these regulations create enforceable individual rights, there is an almost infinite range of other discretionary statutes and regulations of governmental agencies that would also qualify. This would create a substantial burden on governmental entities to accommodate these rights consistent with the dictates of the Fourteenth Amendment, and would substantially restrict state discretion. This type of major change is unwarranted, especially in a fact situation where state officials have complied with two previously existing duties of care.

What is equally troubling about Petitioners' contention is how a 14th Amendment Due Process analysis would be applicable to this alleged right. A right "to access to meaningful medical care" is exceedingly vague and ambiguous. Even Petitioners' attempt to apply their right to the limited context of this case does little to describe the scope of the right with any clarity. Is it a right to treatment by a physician of choice unless such treatment would be in conflict with prescribed treatment? Is it a right to referral to a specialist where any type of heart problem is a possibility? Is it a right to a second opinion in any situation where there is a possibility of life threatening consequences? Or is it simply a right to have requests for supplemental treatment reviewed in a timely manner by physicians?

Whatever the intended scope of the right, it is clear that Petitioner believes the standard of care to be greater than a simple negligence standard under state tort law. In other words, this standard would be applicable even when state officials comply with the tort standard as occurred in this case.[13]

What is even more troubling is how the Fourteenth Amendment Due Process requirement would be applicable to this right. Must the State have a formalized process? Should standards for decision be more clear and specific? Should there be a hearing process or right of appeal?

These questions show the absurdity of attempting to superimpose a due process analysis on regulations that were not intended to create individual rights or expectation. Those regulations were enacted to authorize the Department to approve supplemental medical examination

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[13]Under Petitioners' approach, *Parat v. Taylor*, 451 U.S. 527 (1981), would apparently not be dispositive. In *Parat*, this Court held that Nebraska's tort claim remedy was sufficient due process for alleged negligent acts. *Parat* was modified in *Daniels v. Williams*, ___ U.S. ___, Slip Opinion 54 USLW 4095 (1986) and *Davidson v. Cannon*, ___ U.S. ___, Slip Opinion 54 USLW 4090 (1986), wherein it was determined that simple negligence is not the kind of abusive governmental action the 14th Amendment was intended to protect against.

and treatment in its discretion. They were not intended to create a right upon demand or limit the institution's range of options. This Court should not modify the standards in *Olim* and *Hewitt, supra,* to establish the right sought by Petitioner.

III

There is no need to accept review of this case in order to "clarify" *Estelle v. Gamble.*

Petitioner seems to suggest that the standard in *Estelle, supra,* should be modified to reflect this new right sought to be established. It is implied that the proposed standard is actually being applied by courts in a manner that recognizes this new right, citing *Hoptowit v. Ray,* 682 F.2d 1237 (9th Cir. 1980). In the alternative, it is suggested that it is necessary to substitute the higher standard of care contemplated by their alleged right, for the Eighth Amendment standard established in *Estelle, supra.*[14]

None of the recent opinions of this Court even remotely suggest that the type of vague and ambiguous standard should be established as the proper measure of Eighth Amendment constitutional rights.

This Court has consistently reaffirmed the holding in *Estelle* that the proper standard for Eighth Amendment adequacy of medical treatment claim is "deliberate indifference to serious medical needs." Ordinary lack of due care is insufficient. Cite *Whitley v. Albers,* 475 U.S. ___ (1986) Slip Opinion 54 USLW 4236; *Spaziano v. Florida,* 468 U.S. 447 (1984); *Daniels v. Williams,* 474 U.S. ___

[14]Petitioner apparently also has the mistaken belief that the Ninth Circuit ruled that the *Estelle* standard applies, whether or not the State has created through its statutes and regulations a liberty interest. The Court actually ruled that there is no right to "supplemental" care under the *Estelle* standard standing alone. Unless it could be established that the State had created rights under its statutes or regulations under the standards outlined in *Olim* and *Hewitt,* the *Estelle* standard was applicable.

(1986) Slip Opinion 54 USLW 4095; *Davidson v. Cannon*, 474 U.S. ___ (1986) Slip Opinion 54 USLW 4090. There is no indication in any of these opinions that the existing standard is insufficient for adequate protection of prisoners interests. There is also no hint that it would be beneficial or desirable to adopt the type of right outlined by Petitioner.

The *Estelle* standard is dynamic in the sense that it considers "contemporary values and evolving standards of decency" within the context of medical care *Spaziano v. Florida, supra.* In *Whitley v. Albers, supra,* this Court distinguished the Eighth Amendment standard for medical care from the standard applicable to quelling riots. The Court emphasized that the Eighth Amendment proscription against cruel and unusual punishment should be applied in a manner that reflects the differences in the kinds of responsibilities or conduct in the management of a prison. The deliberate indifference standard was appropriate for medical care because medical needs do not ordinarily clash with other governmental responsibilities. It is not, however, applicable to activities taken to quell prison riots.[15] The opinion in *Whitley v. Albers, supra,* along with the other recent opinions cited indicate that this Court is not ready to junk the standard of *Estelle* in favor of the vague right claimed by Petitioner.

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[15] *Whitley v. Albers, supra,* also deals with another contention Petitioner seems to raise. Petitioner seems to suggest that there is a free standing Fourteenth Amendment liberty right or interest regardless of whether a right is created under state regulations. The inference is that there is a different standard from that contained in *Estelle.* The Court states that the standard for such a right if analytically it did exist, is the equivalent of the Eighth Amendment standard.

CONCLUSION

Petitioners' request that this Court review the Ninth Circuit Court of Appeals opinion and create a right "to access to meaningful medical care" should be denied. The state regulations in question do not under current standards create such a right, and there is no compelling reason to modify these standards. In addition, it is neither necessary nor appropriate to modify *Estelle v. Gamble, supra,* to reflect this vague and ambiguous right. The existing standard along with the tort claim remedy that was pursued but dropped prior to trial, are sufficient to protect the inmates' interest in appropriate medical care. The Petition should be denied.

Respectfully submitted,

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APPENDIX A

State of Washington Administrative Code:

WAC 275-91-011 Medical/dental care—GENERAL POLICY. The policy of the Department of Social and Health Services with regard to medical and dental care for inmates of adult correctional institutions is to provide, at a minimum, a degree of care which is designed to reasonably respond to an inmate's serious medical and dental needs. The considerations of proper medical/dental procedure, time and available resources are material in defining what is a reasonable response in any particular situation. More than the minimum level of care may be provided when such additional care comports with proper medical practice and is reasonably affordable from the department's resources. Serious medical needs are those which, if not responded to, will

(1) Cause or allow to continue significant or debilitating pain; or

(2) Cause significant deterioration of the inmate's medical condition during the period of his incarceration [Order 1252, § 75-91-001, filed 11/21/77.]

WAC 275-91-050—USE OF ALLIED HEALTH PROFESSIONALS. Allied health professionals may be used in the medical and dental health programs at each institution. When operating under the supervision of a licensed physician or dentist, an allied health professional may conduct initial screening, treat minor illnesses, and do related tasks. [Order 1252, § 275-91-050, filed 11/21/77.]

WAC 275-91-070—SUPPLEMENTAL CARE. Any inmate may, at his or her own expense, obtain medical or dental care additional to that mandated by the provisions of this chapter: *Provided*, That a doctor or dentist in the department's employ certifies that the proposal for supplemental treatment comports with sound medical or dental practice. The time and place of the performance of the supplemental care are subject to the convenience of the prison's custody staff. [Order 1252, § 275-91-070, filed 11/21/77.]